

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2022] NZEmpC 130
EMPC 317/2021**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application to participate at a hearing
by audio-visual link

BETWEEN GF
Plaintiff

AND COMPTROLLER OF THE NEW
ZEALAND CUSTOMS SERVICE
First Defendant

AND OFFICIAL ASSIGNEE
Second Defendant

AND TE HUNGA RŌIA MĀORI O AOTEAROA
Intervener

Hearing: On the papers

Appearances: M Dew QC, S Kopu and J Hansen, counsel for plaintiff
H Kynaston and H Khan, counsel for first defendant
R Donnelly and A Anderson, counsel for intervener
No appearance for second defendant

Judgment: 27 July 2022

**INTERLOCUTORY JUDGMENT (NO 6)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application to participate at a hearing by audio-visual link)**

[1] The plaintiff is challenging a determination of the Employment Relations Authority.¹ The hearing is set down for six days commencing next week, on 1 August 2022.

[2] An application has been made by the plaintiff for leave for a witness to participate at the hearing by audio-visual link (AVL). The first defendant is not opposed to the witness giving evidence via AVL in the circumstances. A number of other case management issues have also been raised by counsel, which I touch on below.

[3] The ordinary way for a witness to give evidence in a civil proceeding is orally in a courtroom in the presence of the Judge, the parties and the public.² As the Court of Appeal has made clear, there is no presumption in favour of giving evidence in the ordinary way.³

[4] The Court may allow the use of AVL in civil proceedings, including for the appearance of a party and witnesses. Before doing so, it must take into account whether or not the other party consents to the use of AVL and must have regard to the criteria in s 5 of the Courts (Remote Participation) Act 2010.⁴ The criteria are:⁵

- (a) the nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;
- (c) the potential impact of the use of the technology on the effective maintenance of the rights of the other parties to the proceeding, including –
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the Court; and

¹ *GF v New Zealand Customs Service* [2021] NZERA 382 (Member Beck).

² See, for example, High Court Rules 2016, r 9.51; and Evidence Act 2006, s 83.

³ *Wealleans v R* [2015] NZCA 353 at [34].

⁴ Courts (Remote Participation) Act 2010, s 7.

⁵ Courts (Remote Participation) Act 2010, s 5.

- (ii) the level of contact with other participants;
- (d) any other relevant matters.

[5] The witness resides in Bluff and does not wish to travel to Auckland for the hearing, including because of health concerns. As I have said, the first defendant does not oppose the application; there is nothing about the nature of the proceedings which suggests that the giving of evidence via AVL would be unsuitable; and appropriate AVL facilities are available. While I have considered the potential impact of AVL on the ability to assess credibility and the reliability of evidence presented, those considerations do not warrant an in-person appearance in this case.⁶

[6] In the circumstances, the application for leave for the witness to appear at the hearing and give evidence by AVL is granted.

[7] A second witness for the plaintiff resides in Whanganui. While he is prepared to travel to Auckland to give evidence, he would prefer to attend remotely. Counsel for the first defendant has indicated that they do not have any questions for him based on the brief of evidence which has been filed and served. In the circumstances, it is appropriate for leave to be granted for him to give evidence via AVL.

[8] Counsel for the plaintiff are to liaise with the Court in respect of arrangements for these two witness and to ensure that the agreed bundle of documents is available to each of them when the hearing takes place. The plaintiff is to provide a copy of the Court's Guideline for Appearing by Audio-Visual Link to the witnesses.⁷

[9] Counsel for the intervener seeks leave to attend the hearing via AVL to hear the evidence of the witness residing in Whanganui and, if necessary, to attend the hearing via AVL for final submissions on the reserve hearing day of 9 August 2022. Leave is granted accordingly. The Registry is directed to make the necessary arrangements.

⁶ *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (HC).

⁷ Employment Court 'Guideline for Appearing by Audio-Visual Link'
<<https://employmentcourt.govt.nz/what-to-expect/before-a-hearing/#AVL>>.

[10] I record for completeness that no party may seek costs against Te Hunga Rōia Māori o Aotearoa on its intervention.

[11] The residual matters raised in the joint memorandum are noted, and do not require formal directions or orders.

[12] Costs on this application are reserved pending the outcome of the challenge.

Christina Inglis
Chief Judge

Judgment signed at 10.30 am on 27 July 2022